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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 2000

FORD OLINGER,

Petitioner,

vs.

UNITED STATES GOLF ASSOCIATION.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When, in the face of a disabled person's proposed modification of a public accommodation -- in this case a sports competition -- the promoter of the competition attempts to prove its affirmative defense that the modification would, for purposes of Title III of the Americans with Disabilities Act, "fundamentally alter" the event, must the opponent sustain its burden by specific evidence, pertinent to the disabled person's individual circumstances, or may it rely on a generalized showing, regardless of the disabled person's situation, that the event's exclusivity is "rational?"

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ford Olinger, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)

is reported at 205 F.3d 1001. The opinion of the district court (Pet. App. 17a-41a) is reported at 55 F.Supp.2d 926.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 7, 2000. Mr. Olinger timely filed a petition for rehearing en banc with the Court of Appeals on March 21, 2000 which that court denied on June 22, 2000. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*,are set forth in the appendix to this petition at Pet. App. 42a- 53a.

STATEMENT

This petition seeks review of a decision that followed by one day a decision of another Circuit in a similar case. *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000), *aff'g*, 994 F.Supp. 1242 (D. Or. 1998). In *Martin*, contrary to the case below, the Ninth Circuit held the Americans with Disabilities Act required the operator of a series of golf tournaments to allow a disabled professional golfer use of a cart in competition. *Martin* is before this Court on the PGA Tour's petition for writ of certiorari in No. 00-24.

In terms of general subject matter the two cases are quite similar. Ford Olinger, like Casey Martin, is a disabled professional golfer. Ford Olinger's disability involves "bilateral avascular necrosis, a degenerative condition that

significantly impairs his ability to walk." (Pet. App. 20a). Both Messrs. Martin and Casey requested of their respective promoters of golf tournaments permission to use a cart in competition.[1] Both were denied that accommodation.

Similarities between the two cases continued, to some extent, in terms of their results. On Mr. Martin's suit under the Americans with Disabilities Act, the Court of Appeals for the Ninth Circuit affirmed the lower court's permanent injunction granting him use of a cart. That court held, first, that Title III of the Act applied to PGA Tour and the tournaments it sponsored, *Martin,* 204 F.3d at 997-99; second, that use of a cart was a reasonable accommodation, *Id.*, 999, and, third, that PGA Tour had not proved that Mr. Martin's use of a cart would "fundamentally alter" the competitions to which he had requested access. *Id.*, 999-1002. In Mr. Olinger's case the Seventh Circuit accepted, the lower court's conclusions that Title III applied to the USGA and its tournament (Pet. App. 10a) and, implicitly, that Mr. Olinger's use of a cart in competition was a reasonable accommodation "in the general sense." (Pet. App. 31a, 32a). *Martin* and *Olinger* part company on the question whether use of a cart would "fundamentally alter" the "facilities, privileges, advantages, or accommodations," 42 U.S.C. §12182(a), which the tournament promoter offered its competitors.

In Mr. Olinger's case the district court concluded that allowing him use of a cart would "fundamentally alter" the U.S. Open on essentially two grounds. First, a study of medical

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1. Ford Olinger sought use a cart in the two 18 hole qualifying rounds of the U.S. Open and thereafter, if successful, the 72 holes of the Open itself. (Pet. App. 18a-19a). Casey Martin requested use of a cart in a series of tournaments the PGA Tour sponsored. 204 F.3d at 996.

literature concluded that,

> an average able-bodied 25-35 year-old golfer who rides a cart for an average round of golf on an average summer day . . . has a significant and unfair advantage over an average able-bodied 25-35 year-old golfer who is walking.

(Pet. App. 34a). The district court, however, agreed with Mr. Olinger "that a comparison between average able-bodied golfers is not the issue before the court. . ." (Pet. App. 35A). The court also acknowledged that the "study reveals nothing about whether an able-bodied golfer who walks without pain would be disadvantaged in any way by a golf cart for Ford Olinger. . . ." (Pet. App. 36a). The court stated, nevertheless, that the report "provides a strong basis to believe that as between two roughly similar golfers, the golfer who rides is likely to have some advantage when it comes to fatigue over the golfer who walks." (App. Pet. 37a).

The court then referred to a generalized disabled person, not Ford Olinger, as it described testimony of the report's author.

> Dr. Rippe's testimony leads the court to believe that the advantage would vary with temperature, humidity, terrain number and types of strokes -- and probably would vary with the nature and extent of the person's disabilities.

(*Id.*).

It reached this conclusion:

> The court finds not that a golfer who rides invariably has a competitive advantage over a very similar golfer who walks; the court finds only that a strong possibility exists that on any particular day, such a competitive advantage might exist, and that it might be substantial.

(*Id.*).

The district court addressed the second of the points it found persuasive after noting "in the last 13 years, only 11 golfers have asked permission to ride in the U.S. Open." (Pet. App. 38a). The court asked, "who would make such a determination?"(*Id.*). The court noted that the USGA's application form does not demand information relevant to a request for a cart. The court went on,

> Perhaps the USGA could demand such information but the USGA then also would need to develop a system and a fund of expertise to determine whether a given applicant truly needs, or merely wants or could use but does not need, to ride a cart to compete.

(Pet. App. 38a-39a).

At that point in its decision the district court said, "Once the inquiry moves beyond Mr. Olinger, the issue broadens and becomes far more difficult." (Pet. App. 39a). The court looked to the impact carts would have on the U.S. Open. Accepting the proposition that the U.S. Open's rules have never given "one competitor a systemic advantage over another," the court said, "To require that someone be given the discretion to allow one competitor a potential advantage denied to others would

fundamentally alter the nature of the competition." (Pet. App. 39a-40a).

It concluded its decision with these points:

> It is important, especially when a court deals with athletic competition, not to allow "stamina" or "nature of the program" to become a proxy for discrimination against persons protected by the ADA. . . .
>
> The point of an athletic competition . . . is to decide who, under conditions that are about the same for everyone can perform an assigned set of tasks better than (not as well as) any other competitor.

(Pet. App. 40a-41a).

Given the nature and quality of USGA's evidence in support of its contention of fundamental alteration, the district court was left at the end of trial with medical proof that did not apply to Ford Olinger, the individual, and with a contention of administrative burden based on no experience and no apparent evidence beyond the statement of burden itself.

In its affirmance, the court of appeals did not refer to the medical report at all. Rather, it described extensively Ken Venturi's recollections of the 1964 U.S. Open and Ben Hogan's return from severe injury in 1950, and referred to testimony of two other golfers on the importance of physical endurance and stamina. (Pet. App. 13-15a). The court simply approved the district court's concern over "administrative burdens of evaluating requests to waive the walking rule and permit the use

of a golf cart." (Pet. App. 15a).

The court of appeals concluded its affirmance of the district court by saying, "[T]he decision on whether the rules of the game should be adjusted to accommodate [Ford Olinger] is best left to those who hold the future of golf in trust." (Pet. App. 15-16a).

REASON FOR GRANTING THE WRIT

The Seventh Circuit Has Continued a Conflict Among Circuits by Failing to Require Evidence Specific to a Disabled Person's Situation as His Opponent Attempts to Prove the Affirmative Defense That a Modification of Its Public Accommodation Would Fundamentally Alter That Accommodation

The notion of "fundamental alteration," set forth in 42 U.S.C. §12182(b)(2)(A)(ii), is central to Title III's prohibition of discrimination on the facts of this case. By way of introduction, Section 12182(a) states the general rule that,

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation.

Subsection (b) of Section 12182, captioned "Construction," includes both a general prohibition of discrimination in subparagraph (b)(1) and a set of "Specific prohibitions" of

discrimination in subparagraph (b)(2)(A). The second of the specific prohibitions provides in relevant part:

> (A) Discrimination
>
> For purposes of subsection (a) of this section, discrimination includes--
>
> . . . .
>
> (ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such . . . facilities, privileges, advantages or accommodations to individuals with disabilities, *unless the entity can demonstrate* that making such modifications would fundamentally alter the nature of such . . . facilities, privileges, advantages, or accommodations;
>
> . . . .

42 U.S.C. §12182(b)(2)(A)(ii)(emphasis added).

This language obviously provides an operator of a public accommodation like USGA an affirmative defense. *Johnson v. Gambrinus Co./Spoetzl Brewery,* 116 F.3d 1052, 1058-60 (5th Cir. 1997).[2] The issue this case presents is what kind of evidence must a defendant present in order to make

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2. Title II of the ADA 42 U.S.C. §§ 12131-34, dealing with accommodations and discrimination by public entities, though different from Title III in that it requires reasonable accommodations be provided "qualified individuals," 42 U.S.C. §12132, grants the same affirmative defense as Title III does, but by way of regulation. 28 C.F.R. §35.130(b)(7)(1999). *See. Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996).

good the affirmative defense of "fundamental alteration."

On this point a split among Circuits exists that is far broader than the one between the Seventh and Ninth that *Martin* and this case embody. As the Seventh Circuit in *Olinger* stated, the Sixth and Eighth Circuits look, in cases like this one, to rationality of the rule from which a disabled person seeks an exception: "[C]ourts have repeatedly held that the ADA does not require entities to change their basic nature, character, or purpose insofar as that purpose is rational, rather than a pretext for discrimination." *Citing, Sandison v. Michigan High Sch. Athletic Ass'n,* 64 F.3d 1026, 1035 (6th Cir. 1995), *and Pottgen v. Missouri State High Sch. Activities Ass'n,* 40 F.3d 926 (8th Cir. 1994). (Pet. App. 11a-12a). *Pottgen, Sandison* and *Olinger* each looks to the rule in question and determines its validity without addressing whether it is actually necessary in terms of a disabled person's specific situation. For example, in *Olinger* the court did not decide whether Ford Olinger's use of a cart in qualifying rounds would fundamentally alter the U. S. Open. It concluded that use of carts *by anyone* would fundamentally alter the event. It did so without USGA having presented proof that a cart would give the disabled individual -- Ford Olinger, a man unable to walk 18 holes without debilitating pain and consequent medication -- a competitive advantage of any kind, not to mention avoidance of "'fatigue born of hills, of heat, of humidity.'" (Pet. App. 13a, 40a).

Contrary to this view of the affirmative defense of fundamental alteration, several circuits follow this Court's approach in *School Bd. of Nassau County v. Arline,* 480 U.S. 273 (1987), a Rehabilitation Act case, where the court said at 287, "The remaining question is whether [the plaintiff] is otherwise qualified for the job. . . . [T]o answer this question in most cases, the district court will need to conduct an

individualized inquiry and make appropriate findings of fact." One Circuit (the Seventh, in fact) made clear its reliance on *Arline* as it affirmed a district court's careful consideration of the facts implicating a high school athletic rule that, if enforced, would have disallowed a disabled student from competing in basketball. In an ADA Title II case the court in *Washington v. Indiana High Sch. Athletic Ass'n.*, 181 F.3d 840 (7th Cir.), *cert. denied*, 120 S.Ct. 579 (1999), said, at 851, as it rejected the opposing view in *Pottgen* and *Sandison*,

> We think the individualized approach is consistent with the protections intended by the ADA. The entire point of *Arline's* statement that a person is otherwise qualified if he is able to participate with the aid of reasonable accommodations is that some exceptions ought to be made to general requirements to allow opportunities to individuals with disabilities. To require a focus on the general purpose behind a rule without considering the effect an exception for a disabled individual would have on those purposes would negate the reason for requiring reasonable exceptions.

In addition to *Arline*, *Washington's* holding aligned one panel of the Seventh Circuit with at least two Title III cases from other Circuits. *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059-60 ("The type of evidence that satisfies this burden focuses on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation."); *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2nd Cir. 1995). *See also, Crowder v. Kitagawa*, 81 F.3d 1480, 1485-86 (9th Cir. 1996) (ADA Title II); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 932-33

(Arnold, C.J., dissenting) (same).

To accept USGA's walking rule in this case as "rational, rather than a pretext for discrimination," (Pet. App. 11a-12a) the Seventh Circuit finessed Congress' explicit requirement in 42 U.S.C. §12182(b)(2)(A)(ii) that the entity that would avoid an accommodation "reasonable in the general sense" (Pet. App. 31a) must "demonstrate that making such modification[] would fundamentally alter the nature of such" "facilities, privileges, advantages or accommodations." As the court in *Martin v. PGA Tour, Inc.*, 204 F.3d at 1001, said of the PGA's walking rule, "The mere fact that PGA has defined walking to be part of the competition cannot preclude inquiry, or PGA will have been able to define itself out of reach of the ADA." *Crowder v. Kitagawa*, 81 F.3d 1480, 1483, construing 42 U.S.C. §12101(a)(5), noted at 1483 that "facially neutral" requirements do not immunize entities from the ADA, if the effect of those requirements is to exclude the disabled:

> It is . . . clear that Congress intended the ADA to cover at least some so-called disparate impact cases of discrimination, for the barriers to full participation . . . are almost all facially neutral but may work to effectuate discrimination against disabled persons.

Congress' imposition in 42 U.S.C. §12182(b)(2)(A)(ii) of an affirmative defense on entities like the USGA to prove a modification -- otherwise reasonable -- would nevertheless work a fundamental alteration of the facility, privilege, advantage or accommodation in question, is essential to its decision to stop discrimination by neutral appearing barriers to participation by the disabled. The positions in *Martin v. PGA Tours, Inc.*, 204 F.3d 994, 1002 (9th Cir. 2000); *Washington v.*

Indiana High Sch. Athletic Ass'n, 181 F.3d 840, 851-52 (7th Cir. 1999); *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059-60 (5th Cir. 1997); *Crowder v. Kitagawa*, 81 F.3d 1480, 1485-86 (9th Cir. 1996), and *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (1st Cir. 1995), that the proof necessary to the defense must be both detailed and addressed to the specific circumstances of the individual fulfill Congress' concern over discrimination by forms of apparently benign, but in fact exclusionary conditions of participation.

The Sixth, Seventh and Eighth Circuits' acceptance of "policies, practices or procedures," 42 USC §12182(b)(2)(A)(ii), that are "rational," *Olinger v. United States Golf Ass'n*, (Pet. App. 11a-12a); *Sandison v. Michigan*, 64 F.3d 1026, 1034-35, 1036-37 (8th Cir. 1995); *Pottgen v. Missouri High Sch. Activities Ass'n*, 40 F.3d 926, 929-31 (8th Cir. 1994) -- without requiring of the policies' proponents a factually detailed investigation of the policies' actual operations in individual cases -- both ignores Congress' intent stated in Titles II and III of the ADA and conflict with those decisions of the Second, Fifth, Ninth (and Seventh) Circuits just noted.

Given Congress' imposition of a burden of proof on persons and entities operating public accommodations who claim a modification of their policies and procedures would fundamentally alter the accommodations, this Court should resolve this conflict among Circuits over how that burden must be sustained. This Court should state, consistent with what Congress both said and intended to achieve, that to prove a modification -- found to be reasonable in the general sense -- would nevertheless fundamentally alter a policy, practice or procedure, the opponent must present actual evidence (not mere statements of concern) that addresses the disabled individual's personal circumstances as they interact with the opponent's

"facilities, privileges, advantages, or accommodations." 42 U.S.C. §12182(b)(2)(A)(ii).

CONCLUSION

In Titles II and III of the Americans With Disabilities Act Congress intended to cover broadly a multitude of circumstances, occasions and events that had in the past been barred from individuals burdened with physical or mental disabilities. Since the function of the "fundamental alteration" defense is to close what Congress intended to open, this Court should resolve the conflict among Circuits on how the defense may be proved. Resolution of this conflict will, as it must, reach far beyond matters of professional or amateur sports.

Ford Olinger requests this Court to grant his petition for certiorari and clarify this area of growing judicial confusion.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT.

No. 99-2580

FORD OLINGER,
Plaintiff-Appellant,
v.
UNITED STATES GOLF ASSOCIATION,
Defendant-Appellee.

Argued Feb. 7, 2000
Decided March 7, 2000

Before KANNE, ROVNER, and EVANS, Circuit Judges.

TERENCE T. EVANS, Circuit Judge.

This case presents a clash between big-time sports and the Americans With Disabilities Act (ADA). It pits the venerable United States Golf Association (USGA) against a professional golfer who wants to compete in America's greatest--and most democratic--golf tournament, the United States Open.

Ford Olinger is a highly skilled golfer who, since 1988, has held a "professional" title by virtue of a certification he received from the Professional Golfers Association (the PGA).

But Olinger suffers from bilateral avascular necrosis, a degenerative condition that significantly impairs his ability to walk. Everyone agrees he is a "disabled" person within the meaning of the ADA. Because of his disability, Olinger wants to be allowed to ride in a golf cart as he competes to qualify for the Open. The USGA balks at this request, arguing that the ADA does not apply to its tournament and that, even if it did, the use of a cart by a player would "fundamentally alter the nature" of the tournament. The district court, on the latter argument, granted judgment for the USGA. Today we resolve Olinger's appeal from that decision.

The USGA is a private, not-for-profit association of member golf clubs and golf courses, chartered for the purpose of promoting and conserving the best interests and the true spirit of the game of golf. The USGA claims no legal power with respect to the game beyond its own championships which it conducts each year in 13 designated categories, such as the U.S. Women's Open, U.S. Senior Open, and U.S. Amateur. Nevertheless, the USGA is regarded as the governing body of golf in the United States by the common and voluntary consent of the golf community, including individual golf enthusiasts everywhere. The USGA is concerned with all aspects of golf, especially preserving the integrity of the game and the conditions unde which it is played. The official "Rules of Golf" by the USGA (and the Royal and Ancient Golf Club of St. Andrews, Scotland) is a staple in the bag of all true golfers.

The United States Open is the men's national championship of golf in America. It has been conducted yearly since 1895, with the exception of the war years 1917-18 and 1942-45. It is played at a different premier golf course in June of every year.[1]

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1. Its venues are true meccas of tournament golf, places like Winged Foot (Mamaroneck, New York); Medinah (Medinah, Illinois); Shinnecock Hills

The 100th United States Open golf championship will be contested this year at the historic Pebble Beach course in California.

Past winners of the U.S. Open include legends in the game: Bobby Jones (1923, 1926, 1929, and 1930); Gene Sarazen (1922, 1932); Byron Nelson (1939); Ben Hogan (1948, 1950, 1951, and 1953); Arnold Palmer (1960); Jack Nicklaus (1962, 1967, 1972, and 1980); Gary Player (1965), Hale Irwin (1974, 1979, and 1990); Tom Watson (1982); and Lee Trevino (1968, 1971).[2]

The U.S. Open is treated with respect by great players of the game. As John Feinstein reports in his recent work "The Majors" (Little, Brown and Company 1999), golfer Payne Stewart's father "always insisted" he use the formal "William Payne Stewart" on his U.S. Open application because, quoting Payne, "Dad always said this is the United States Open, your

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(Southampton, New York); Merion (Ardmore, Pennsylvania); and Congressional (Bethesda, Maryland).

2. Others, of course, could be added to this list. Willie Anderson, for example, a Scotsman who emigrated to the United States just before the turn of the century, was the first four-time U.S. Open winner (1901, 1903, 1904, and 1905), a feat equaled only by Jones, Hogan, and Nicklaus. Anderson is also the only player to win the Open three years in a row, and he had several other close calls as well. He finished second in 1897 when Joe Lloyd, one of the long drivers of the time, eagled 18--the only Open to be won by an eagle on the final hole. He also finished third, fourth twice, and fifth three times. And he set scoring records, including the first-ever 72 score (par) for a round at the Open in 1901. In addition to Anderson, the list could include double Open champions like Walter Hagen, Ralph Guldahl, Julius Boros, Billy Casper, Andy North, Curtis Strange, and Dr. Cary Middlecoff.

national championship, you write down your full name.[3]

In a typical year, over 7,000 players submit applications to play in the U.S. Open. All professional golfers can play in local qualifying rounds, along with amateurs who carry at least a 1.4 certified USGA handicap index. Local qualifying rounds in May reduce the field to around 750 for the sectional qualifying rounds, from which close to 100 survivors join about 60 of the world's best golfers who are exempt, based on published criteria, from preliminary rounds. The field for the Open is limited to 156 players.

The USGA holds its local and sectional qualifying rounds at different courses every year. Competition in the qualifying rounds is keen, often necessitating playoffs to break ties and establish who will advance to further action. Competition in the U.S. Open itself is fierce. In 30 of the 99 U.S. Opens played since 1895, 2 or more competitors were tied at the end of 72 holes of regulation play, requiring a playoff to determine the national champion. And that champion is always the survivor of a brutal ordeal, as the USGA sets up its championship course with narrow fairways and rough so high that even a slightly errant shot puts the player in jail, where he usually faces at least a bogey once he gets to a lightning-fast green. In short, the consensus in the golf world is that the U.S. Open is the greatest test in golf.

This test is controlled by the "Rules of Golf"--34 separate rules and appendices, totaling 144 pages. In addition, the USGA publishes hundreds of interpretations of the rules, applying

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3. Stewart won the U.S. Open in 1991 (at Hazeltine National in Minneapolis) and again last year in a memorable finish at Pinehurst in North Carolina. He will not, of course, defend his championship this June as he died, tragically, in a mysterious plane crash last fall in South Dakota.

them to myriad specific facts and circumstances. The USGA also develops and issues a set of "Local Rules and Conditions of Competition for USGA Championships" which apply to all USGA Championships, as well as a "Notice to Competitors" for players competing in each USGA Championship spelling out the local rules that have been adopted by the USGA Championship Committee.

The "Rules of Golf" restricts such things as the physical properties of clubs and balls, the number of clubs players may use during a round, and golfers' behavior while in play. The rules are strict, sometimes even odd, as, for example, the provision that penalizes a player two strokes if he asks an opponent how far away he thinks the green is, because information of that sort is "advice which could influence a stroke."[4] Although the rules do not expressly preclude the use of golf carts, they empower tournament competition committees to set conditions for an event, including whether to prohibit the use of carts.

Golf carts started appearing with increasing regularity on American golf courses in the 1950's. Today they are everywhere. And they are encouraged. For one thing, they often speed up play, and for another, they are great revenue producers. But since 1955 the entry forms for every U.S. Open have informed competitors that "[p]layers shall walk at all times during a stipulated round." The USGA requires competitors to walk the course because it believes that their physical endurance and stamina are important parts of the competition.[5]

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4. Rule 8, USGA "Rules of Golf," 1999-2000.

5. The prohibition against using golf carts is in effect for all but 2 of the 13 national championships that the USGA conducts. The USGA has permitted competitors to use carts in the Senior Amateur and the Senior Women's

Still, the record in this case discloses that since 1986 the USGA has received 12 requests from 11 different people seeking waivers of the prohibition against using carts in the U.S. Open. The USGA does not have an established procedure for waiving the rule. In fact, only one player since 1895 has ever ridden in a cart while playing in the U.S. Open. Every other player, and there have been tens of thousands, has walked the Open course from start to finish.

Which brings us to Casey Martin. By now, everyone in the golf world and most of the public at large knows about Mr. Martin. He is, like our Mr. Olinger, a disabled professional golfer. Martin sued the PGA Tour (a separate entity unrelated to the USGA) under the ADA for the right to play in its tournaments while riding in a golf cart. Martin won his suit when a federal magistrate judge in Oregon cleared him to play in PGA events, ruling that not doing so would violate the ADA. *Martin v. PGA Tour, Inc.*, 994 F.Supp. 1242 (D.Or.1998). That decision is on appeal in the United States Court of Appeals for the Ninth Circuit. And although the Martin decision was not binding on it, the USGA voluntarily agreed to abide by the ruling, and so Martin played and rode his cart in the 1998 U.S. Open.

Like Martin, Olinger applied to play in the 1998 Open and asked to use a cart. When the USGA denied his request, he sued under the ADA 4 days before local qualifying was

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Amateur. These events are played in the fall, when school is in session, and there are few caddies available to carry players' bags. Especially because of the age of the competitors, requiring some competitors to carry their own bags while others have caddies would give an advantage to those with caddies. Thus, the USGA has ensured a "level playing field" for all by allowing the use of golf carts in those two championships. Approximately 75 percent of the players in the Senior Amateur and the Senior Women's Amateur use carts.

scheduled to get underway in South Bend, Indiana. The district court gave him a TRO and, armed with his court order, Olinger played, but not well, failing to advance to sectional action. Later, after a full trial, the district court sided with the USGA.

Congress enacted the ADA to ensure that individuals with disabilities fully enjoy the goods, services, privileges, and advantages available indiscriminately to other members of the general public. The ADA's mandate extends to three broad, yet distinct, areas: employment (Title I), public services (Title II), and places of public accommodation (Title III). This case can only fit, if at all, under Title III.

Title III of the ADA applies to "place[s] of public accommodation." Regulations broadly define "place of public accommodation" as "a facility, operated by a private entity, whose operations affect commerce and fall within at least one" of the categories set forth in 42 U.S.C. § 12181(7):

> (A) an inn, hotel, motel, or other place of lodging ...;
> (B) a restaurant, bar, or other establishment serving food or drink;
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
> (G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;
(I) a park, zoo, amusement park, or other place of recreation;
(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

A "golf course" is mentioned in (L) but, as the USGA correctly observes, an entity may simultaneously be both a place of public accommodation and a place that is not fully subject to Title III--in other words, a "mixed use" facility. Pursuant to Justice Department regulations implementing Title III, to the extent that a mixed use facility "is not open to the general public," it "is not subject to the requirements for public accommodations." 28 C.F.R. ch. 1, pt. 36, App. B, at 624. It is this interpretation that the USGA banks on as its reason for claiming that the ADA does not apply to its tournament.

In a nutshell, the USGA argues that the courses where the U.S. Open is played are "mixed use" facilities subject to Title III regulations "outside the ropes" where the general public has unfettered access to the course but not "inside the ropes," where the actual championship competition is conducted and access is tightly restricted. The USGA concedes that a golf course is listed as one of the examples of a place of public accommodation under the ADA (42 U.S.C. § 12181(7)(L)). But the USGA says it is only properly classified as such when it is used for "exercise or recreation," and the U.S. Open is not conducted for those purposes: It is held to identify America's

national golf champion.

Following this thinking, places like Green Bay's Lambeau Field and Chicago's Wrigley Field would be "mixed use" facilities. Although they would be subject to the ADA in general, their actual fields of strife--where Packers battle Bears and Cubs play Cardinals--would not be places of public accommodation under the ADA.

While there may be some logic to this contention, we hesitate to embrace it for we can resolve this appeal, as did the district court, on a more narrow ground. Even assuming that the competitive part of the golf course on which the U.S. Open is played is a place of public accommodation covered by the ADA, Mr. Olinger cannot prevail because we believe his use of a cart during the tournament would fundamentally alter the nature of the competition.

Olinger's contention on appeal is that "the USGA failed to present proof-- responsive to the disabled golfer's personal circumstances as they interacted with the USGA's event--that in fact allowing a cart would fundamentally alter the event." According to Olinger, trial testimony did not support the district court's conclusion because it "did not bear on Mr. Olinger at all." In addition, Olinger contends that the USGA "presented no proof" that allowing him to use a cart "would impose impossible administrative burdens."

Under Title III of the ADA, an owner, operator, lessee, or lessor of public accommodations must "make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, [or] facilities ... to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, ... or accommodations[.]" 42 U.S.C. § 12182(b)(2)(A)(ii) (emphasis

added).

The "fundamentally alter" concept originated under the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979). In *Davis*, a deaf nursing student who was unable to complete the required clinical work in her program requested that the school permit her to substitute different work. The Supreme Court held that the requested accommodation was unreasonable because the Rehabilitation Act was not intended to accommodate an individual who cannot "meet' all of a program's requirements in spite of [a] handicap." 442 U.S. at 406, 99 S.Ct. 2361. The Court explained that to lower or to effect substantial modifications of standards to accommodate a handicapped person is not a reasonable modification. "Such a fundamental alteration in the nature of a program is far more than the 'modification' the regulation requires." *Id.* at 410, 99 S.Ct. 2361.

In light of *Davis*, courts have repeatedly held that the ADA does not require entities to change their basic nature, character, or purpose insofar as that purpose is rational, rather than a pretext for discrimination. *See, e.g., Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026, 1035 (6th Cir.1995) (rejecting disabled students' challenge to an athletic age requirement); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir.1994) (finding that waiving an essential eligibility standard would fundamentally alter the nature of a youth baseball program). In addition, under both the Rehabilitation Act and the ADA,[6] courts consistently have

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6. Because the ADA is patterned in large measure on the Rehabilitation Act, decisions interpreting the Rehabilitation Act and its implementing regulations provide useful guidance as to "the meaning of the same terms in the new law." *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538,

concluded that an accommodation is not reasonable if it imposes an undue financial and administrative burden. *See School Bd. v. Arline*, 480 U.S. 273, 287 n. 17, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987) (Rehabilitation Act), and *Sandison*, 64 F.3d at 1035 (ADA case) ("It is plainly an undue burden to require high school coaches and hired physicians to determine whether [various] factors render a student's age an unfair competitive advantage.... It is unreasonable to call upon coaches and physicians to make these near-impossible determinations.").

The district court concluded that "the nature of the competition would be fundamentally altered" if the walking rule were eliminated because it would "remove stamina (at least, a particular type of stamina) from the set of qualities designed to be tested in this competition." As a result, "[c]onditions that now affect a golfer's performance, but which lie beyond the golfer's ability to control--the fatigue born of hills, of heat, of humidity-- would lessen in importance to the competition." Finally, in summarizing its ruling in favor of the USGA, the district court returned to the "nature of the 'program' to which Mr. Olinger seeks access: the U.S. Open" and concluded,

> [t]he point of an athletic competition ... is to decide who, under conditions that are about the same for everyone, can perform an assigned set of tasks better than (not as well as) any other competitor. The set of tasks assigned to the competitor in the U.S. Open includes not merely striking a golf ball with precision, but doing so under greater than usual mental and physical stress. The accommodation Mr. Olinger seeks, while reasonable in a general sense, would alter the fundamental nature of that competition.

These findings are amply supported in the record. For

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542 (7th Cir.1995).

example, Ken Venturi, the winner of the 1964 U.S. Open, testified that physical and mental fatigue and a uniform set of rules for all golfers are integral parts of championship-level golf. Olinger's own expert witness, Dennis Hepler, likewise testified that physical endurance and stamina and uniform rules are critical factors in determining the winner of a championship-level golf competition. Dr. Theodore Holland also testified that physical endurance and stamina are important criteria in determining the national golf champion. As he put it, "[t]here is a lot more to getting ... around those 72 holes than just hitting the shots."

We find the testimony of Ken Venturi to be particularly persuasive. During his storied career as a PGA professional he competed in 15 Masters tournaments. For the last 31 years he has been the golf analyst for CBS Sports. His testimony regarding the 1964 U.S. Open, by itself, supports the golf community's insistence that all players play all tournaments under the same conditions and rules.

Back in 1964 the U.S. Open was played over 3 days, with 18 holes played on Thursday and Friday and the final 36 holes on Saturday. The temperature hovered near 100 degrees in 1964, and the humidity was at 97 percent. Venturi, like all other competitors, walked the morning round and fired a 66. (When asked his score during the trial, Venturi replied "a 66" but, like all golfers, he could not leave it at that, for he added "with two small misputts. I 3- putted from 12 feet at 17 and missed a 3-footer at 18.") Venturi said he rested for about a half an hour before going out against the advice of his doctor to play the afternoon 18. In the stifling heat and humidity, battling dehydration, Venturi walked the course and, on the verge of collapse, won the tournament. In that tournament everybody played under the same grueling conditions. Venturi explained, "That's the beauty of it." If another competitor would have

been riding in a cart, there would have been a "tremendous advantage to the other player," Venturi said.

Finally, Venturi recalled the amazing story of Ben Hogan. Hogan was severely injured in 1949 when his car collided with a Greyhound bus. He was told he would never walk again, let alone play golf. Yet the next year, he walked and won the U.S. Open. During the trial, Venturi was asked if there was any accommodation made to Hogan as a result of his accident. Venturi replied, "They never thought about it. They never thought about carts. And knowing Ben Hogan as well as I have, he wouldn't take one." Olinger's situation, of course, is more dire than was Hogan's in 1950, and we don't mean to suggest that Olinger is any less of a competitor than the great Hall of Famer. We offer Venturi's statement for one reason: it emphasizes the importance and tradition of walking in championship-level tournament golf competition.

The district court also offered a second rationale for ruling in favor of the USGA, the administrative burdens of evaluating requests to waive the walking rule and permit the use of a golf cart. As the court explained, the USGA "would need to develop a system and a fund of expertise to determine whether a given applicant truly needs, or merely wants, or could use but does not need, to ride a cart to compete." The district court thought that this should be unnecessary. We agree.

The focus of our opinion has been on one question: Must the USGA allow Ford Olinger to compete while riding in a golf cart instead of walking? The answer is "no." The question we have not addressed is whether the USGA should give seriously disabled, but otherwise well-qualified, golfers a chance to compete. Compared to most people who play golf, Olinger's skill level is beyond comprehension. And without question, most players would prefer to walk while playing competitive,

championship-caliber golf. Surely a player like Olinger would gladly trade in his cart if he could walk a golf course without pain. But the decision on whether the rules of the game should be adjusted to accommodate him is best left to those who hold the future of golf in trust. Because the law does not force the USGA to make the accommodation Olinger seeks, the judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT,
N.D. INDIANA.

No. 3:98-CV-252RM.

FORD OLINGER,

Plaintiff,

v.

UNITED STATES GOLF ASSOCIATION,

Defendant.

May 20, 1999.

MEMORANDUM AND ORDER

MILLER, District Judge.

A professional golfer whose physical condition prevents him from playing a full round of golf on foot seeks an order allowing him to use a golf cart to qualify for and compete in the United States Open golf tournament. The Americans with Disabilities Act does not require accommodation for a disabled individual when the accommodation would fundamentally alter the nature of the activity. The tournament operator has persuaded the court that allowing the use of a golf cart would fundamentally alter the nature of this particular tournament, either by eliminating the uniformity of rules common to athletic events, or by changing the importance of a competitor's response to fatigue.

I

Ford Olinger is a disabled individual within the meaning of the Americans Disabilities Act. Mr. Olinger wants to compete in the United States Open Championship, a tournament conducted by the defendant United States Golf Association ("USGA"), and advance to the championship rounds. As a professional golfer, he is eligible to apply to compete in the local qualifying for that championship.

The U.S. Open is one of thirteen national championships the USGA conducts each year. Criteria for entry and tournament format vary with the event. The tournament at issue here, the U.S. Open, consists of four rounds of golf that usually are played on four consecutive days, but occasionally require more than one round in a single day. The golfer with the fewest strokes over 72 holes (or any required playoff) is declared the national golf champion by the USGA and is awarded prize money. The U.S. Open field in the championship is limited to 156 golfers. Objective, published criteria (which are meant to ensure that the world's pre-eminent golfers need not prove their abilities anew) exempt about 37% of the eventual field from preliminary qualifying. A two-step preliminary process--local qualifying and sectional qualifying--determines the non-exempt spots in the U.S. Open.

The USGA requires that a participant in the local qualifying round carry a certified handicap index of 1.4 or better for amateurs, or status as a professional (professionals do not carry handicaps). 7,117 golfers (including those exempted from qualifying) were accepted to compete in the 1998 U.S. Open. In 1998, local qualifying was conducted with an 18-hole round at each of 90 sites. 750 of the 6,881 competitors in the local qualifying advanced to sectional qualifying, which consists of 36 holes in a single day and is conducted at twelve sites across

the nation. The USGA holds the U.S. Open Championship and the local and sectional qualifying rounds for the Championship at different sites every year, and occupies each site for a limited time before, during, and after the subject events. A little over 95% of the 103 courses used in 1998 for the U.S. Open championship and qualifying rounds were private clubs. The USGA oversees the competition and leased the Olympic Club for the 1998 U.S. Open Championship.

Mr. Olinger wants to play in the May 24, 1999 local qualifying at the South Bend Country Club, but the USGA forbids the use of carts by participants in the U.S. Open and its qualifying rounds, and Mr. Olinger can no longer walk the course while playing a round of golf. Mr. Olinger participated in the 1998 local qualifying round with the use of a cart pursuant to a temporary restraining order from this court.[1] He shot 83 at the local qualifying round, which placed him 63rd out of 75 competitors, and so did not advance to the sectional qualifying. The best score at the local qualifying in South Bend was 65.

Mr. Olinger's disability arises from bilateral avascular necrosis, which significantly impairs his ability to walk. He had surgery on his left hip in May 1997, and has deferred similar surgery on his right hip due to pain. The Social Security Administration has determined that Mr. Olinger is disabled within the meaning of regulations that govern Social Security payments--

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1. The court concluded that a temporary restraining order was appropriate under the standards applied in this circuit in recognition that: (1) exclusion from the local qualifying would have meant the Mr. Olinger could not participate in the 1998 championship even if he prevailed on his ADA claim before the championship began; (2) the restraining order would only apply to the local qualifying because it would expire before sectional qualifying; and (3) in light of a previous agreement between the USGA and professional golfer Casey Martin, Mr. Olinger would not be the only golfer to ride a cart in local qualifying.

regulations that, it should be added, have nothing whatsoever to with the Americans with Disabilities Act. Mr. Olinger takes medication that reduces the pain, but which also impairs his lung capacity, dulls his senses, and causes fatigue. Were it not for his disability, Mr. Olinger would prefer to walk the course than to ride during the course of a competitive round; he believes that walking helps his rhythm, enhances his feel for the game and the competition, and improves his ability to identify the ground texture. When riding a cart, he must keep his mind on matters other than the next shot, which he feels is a disadvantage in comparison to the walking golfer. Notwithstanding this preference, Mr. Olinger's bilateral avascular necrosis makes it nearly impossible for him to walk an 18-hole golf course. He can complete 18 holes of golf only with the use of a golf cart.

The USGA is a private, not-for-profit association supported by some 750,000 individuals and chartered "for the purpose of promoting and conserving throughout the United States the best interests and the true spirit of the game of golf as embodied in its ancient and honorable traditions." The parties stipulate that while the USGA neither has nor claims any legal power or right with respect to the game of golf beyond the conduct of its own tournaments, the USGA is, by the golf community's common and voluntary consent, regarded as the governing body of golf within the United States. In addition to operating the U.S. Open and twelve other tournaments, the USGA produces the official rules of the game of golf.

Title III of the Americans with Disabilities Act was enacted to facilitate disabled individuals' access to places of public accommodation. Consistent with this goal, the Act states broadly: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations

of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). Regulations define "place of public accommodation" as "a facility, operated by a private entity whose operations affect commerce and fall within at least one" of the categories set forth in § 12181(7):

(A) an inn, hotel, motel, or other place of lodging ...;
(B) a restaurant, bar, or other establishment serving food or drink;
(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
(D) an auditorium, convention center, lecture hall, or other place of public gathering;
(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
(G) a terminal, depot, or other station used for specified public transportation;
(H) a museum, library, gallery, or other place of public display or collection;
(I) a park, zoo, amusement park, or other place of recreation;
(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7). *See* 28 C.F.R. § 36.104 (1998).

II

Mr. Olinger maintains that the USGA is a private entity that is a public accommodation or that owns, leases or operates a place of public accommodation as those terms are used in the ADA, 42 U.S.C. § 12181. The USGA sought summary judgment on several grounds. Because of a concern (that proved to be unfounded) that the case might have become moot, the court deferred ruling on the summary judgment motion until the final pretrial conference; at that conference, the court ruled against the USGA on several arguments. The summary judgment ruling was oral and brief, and the court believes it is appropriate to explain that ruling in greater detail. This portion of today's opinion explains that ruling. The reader should recall that the summary judgment ruling was based on a record different from the trial evidence. Part II of this opinion is based on the summary judgment record.

The USGA argued that the U.S. Open and other USGA championships are not "public" and so are not places of public accommodation under the ADA. Mr. Olinger noted that any amateur with the requisite handicap may play in the local qualifying, as may any golf professional, regardless of skill level. Mr. Olinger also argued that the popularity and record participation in the U.S. Open demonstrate that the USGA conducts the U.S. Open as a public accommodation.

It is unnecessary to decide if the U.S. Open is a "public" event or if the USGA conducts the U.S. Open as a public accommodation because the U.S. Open is not a "place of public accommodation." The ADA prohibits discrimination on the basis of disability by any person who owns, leases, or operates a place of public accommodation. *See* 42 U.S.C. § 12182. In the same way that "Congress could ... have avoided the use of

the word 'place' in subsection (b)(3)" of Title II of the Civil Rights Act of 1964, *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1273 (7th Cir. 1993), Congress could have avoided the use of the word "place" in Title III of the ADA. Congress chose to list places, not events or activities, as public accommodations. *See* 42 U.S.C. § 12181(7). An event or activity is not a public accommodation or a place of public accommodation within the reach of Title III. Whether the U.S. Open is "public," the U.S. Open is not a "public accommodation" or a "place of public accommodation." The inquiry must focus on the place, not the event.

The USGA, a membership organization, argued that a membership organization with no close connection to a particular facility or location, and without affiliation with a place open to the public where membership in the organization is a predicate to the facility's use, is not a "place of public accommodation" within the meaning of Title III of the ADA. *See Welsh v. Boy Scouts of America*, 993 F.2d at 1270-1271 (rejecting the argument that "places of public accommodation" include membership organizations lacking a close connection to a specific facility); *Elitt v. U.S.A. Hockey*, 922 F.Supp. 217, 223 (E.D. Mo. 1996) (local and national hockey associations did not constitute places of public accommodation). For Title III of the ADA to apply to the USGA, the USGA must be classified properly as an owner, lessor, lessee, or operator of a place of public accommodation. *See Welsh v. Boy Scouts of America*, 993 F.2d at 1273; *see also Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-613 (3d Cir. 1998); *Stoutenborough v. National Football League*, 59 F.3d 580, 583 (6th Cir. 1995); *Bowers v. National Collegiate Athletic Ass'n*, 9 F.Supp.2d 460, 483 (D.N.J. 1998); *Tatum v. National Collegiate Athletic Ass'n*, 992 F.Supp. 1114, 1119 (E.D. Mo. 1998); *Brown v. 1995 Tenet ParaAmerica Bicycle Challenge*, 959 F.Supp. 496, 499 (N.D.

Ill. 1997). The USGA, like the youth hockey league, the professional football league, and the Boy Scouts of America, is a membership organization and as such is not itself a place of public accommodation.

But Mr. Olinger does not seek admission to the USGA; he seeks equal access to the golf courses the USGA uses each year in May and June. The USGA argues that it lacks any close connection to a particular facility or location and that it does not own, lease, or operate a place of public accommodation.

Although the ADA does not define "operates," the preamble to the regulations promulgated under Title III specifies that the coverage of the "owns, leases (or leases to), or operates" language is "quite extensive" and includes operation, "even if the operation is only for a short time." 28 C.F.R. pt. 36, app. B at 591 (1998). For a day in May each year, the USGA, a private entity, operates 90 golf courses for the local qualifying rounds and 12 golf courses for the sectional qualifying rounds. The USGA restricts the normal operations of these courses by reserving the golf courses exclusively for the USGA entrants for the day and the time necessary to complete the qualifying rounds. The USGA supervises the play, provides the rules, officiates the play, sets up the golf course, and determines the groupings of players and their tee times.[2] USGA control over

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2. The USGA asserts that the Official in Charge, a volunteer typically from a state or regional local golf association that is independent of and separate from the USGA, has the authority to disqualify or remove a competitor and is responsible for all matters pertaining to spectators and other non-competitors in qualifying rounds. Although the Official in Charge is responsible for these aspects of the qualifying competitions, the USGA does not dispute that it supervises the play during the rounds of golf and determines who gets to play, what time they play, with whom they play. In the 1998 qualifying in South Bend, the Official in Charge was Mr. Bob Lee, a member of the USGA's Sectional Affairs Committee. At trial, the

the host golf course for the championship is much more extensive and in 1998 consisted of a lease granting the USGA nearly four years of some form of control over the Olympic Club in San Francisco.[3] The USGA exercises substantial control over the operations of the golf courses used in local and sectional qualifying rounds and the championship rounds. It operates the qualifying sites and leases and operates the championship site.

The USGA also argues that the area "inside the ropes" on a golf course during the U.S. Open--the part of the course in which the contestants hope to play the game--is not a place of public accommodation because it is off limits to the general public. The ADA specifies a "golf course or other place of exercise or recreation" as a category of public accommodation. 42 U.S.C. § 12181(7)(L). The USGA argues that because the U.S. Open is conducted to identify the national champion, the event is not conducted (and the golf course is not used) for exercise or recreation. The USGA contends that the area "inside the ropes" is more analogous to a place of exhibition or entertainment. *See* 42 U.S.C. § 12181(7)(C).

"Many facilities that are classified as public accommodations are open only to specific invitees." *Independent Living Resources v. Oregon Arena Corp.*, 982 F.Supp. 698, 759 (D. Or. 1997). A mixed use facility, consisting of an exempt facility of which a portion is a public accommodation, can also

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USGA asked Mr. Lee about "protocol" for handling disruptive contestants or spectators; that exchange did not, of course, affect the summary judgment ruling.

3. The control exercised by the USGA over the Olympic Club during the championship extended to nearly every aspect of the club operations except the snack bar operations in the club and the club annex.

exist; the USGA cites the example of a general public tour of a private facility. *See* 28 C.F.R. pt. 36, app. B at 587 (1998). The regulations do not provide, however, for a private enclave in a public accommodation. *See Martin v. PGA Tour. Inc.*, 984 F. Supp. 1320, 1326-1327 (D. Or. 1998).

This case is similar to a series of cases addressing the NCAA and its determination of eligibility of college athletes. *See Bowers v. National Collegiate Athletic Ass'n*, 9 F.Supp.2d 460 (D.N.J. 1998) (football player with a learning disability); *Tatum v. National Collegiate Athletic Ass'n*, 992 F.Supp. 1114 (E.D. Mo. 1998) (basketball player with a generalized anxiety disorder and a specific phobia related to testing); *Ganden v. National Collegiate Athletic Ass'n*, No. 96C6953, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996) (swimmer with a learning disability); *Butler v. National Collegiate Athletic Ass'n*, No. C96-1656D, 1996 WL 1058233 (W.D. Wash. 1996) (football player with a learning disability). In each of these cases, the NCAA denied eligibility to arguably elite athletes (they were recruited by Division I schools--Temple, Iowa, Michigan State, St. Louis University, University of Washington--and were offered scholarships for their athletic abilities) because of their disabilities. The courts found that the NCAA exercised enough control over the athletic facilities, as places of exercise and recreation as well as places of exhibition or entertainment, to make the NCAA an operator of the facilities. The athletes in these cases were the performers rather than the audience, just as the 6,881 golfers at the local qualifying events, the 750 golfers at the sectional qualifying events, and the 156 golfers at the championship were the performers. The courts in the NCAA cases did not find Title III limited by the roped-off, competitive portion of the field, court or pool, and nothing supports a finding that the USGA's barrier ropes limit Title III. The ADA applies to the areas of competition during the U.S. Open

championship and qualifying rounds as well as to the gallery and the areas outside the ropes.

Finally (for purposes of explaining the summary judgment ruling), the USGA argues that organizers of championship-level competitions have the legal right to define the rules for that competition. Citing *New York Roadrunners Club v. State Division of Human Rights*, 55 N.Y.2d 122, 447 N.Y.S.2d 908, 432 N.E.2d 780, 781 (1982), which held that because the New York City Marathon is a footrace, its organizers had no obligation to allow other means of locomotion, the USGA argues that the organizer of a championship athletic competition must have the right to define its event and the rules of its competition. Mr. Olinger responds that if the USGA is right on this point, sport becomes the only industry in America allowed to construct barriers to access that are unrelated to performance.

As another district court stated in a somewhat similar case, the USGA's contention that it alone may set the rules is simply another version of its argument that the USGA is exempt from the provisions of the ADA, "[a]nd it is not." *Martin v. PGA Tour, Inc.*, 994 F.Supp. 1242, 1246 (D.Or. 1998).[4] Insofar as the USGA operates a place of public accommodation, it is subject to Title III of the ADA.

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4. A word should be added about the Martin case, since today's ruling no doubt appears to conflict with that well-publicized holding. This court need not evaluate the Martin holding, first, because the decision of a district court in another circuit has no precedential impact on this court, and further, this case is different from the Martin case. First, this case focuses on a single event, not a series of multi-level weekly tournaments. Further, the parties in Martin presented different evidence, so the records differ. For example, the Martin court cited the testimony of Dr. Gary Klug with some frequency; this court granted the USGA's motion to exclude Dr. Klug's testimony for want of sufficient showing of reliability of underlying scientific principles.

III

The court found a genuine issue of material fact, and so denied the summary judgment motion, insofar as the USGA argued that the accommodation that Mr. Olinger requests would fundamentally change the nature of the activity. Following the trial conducted on May 17-18, the court finds itself in agreement with the USGA's argument.

As explained in the previous section, the USGA is a lessor of a public accommodation, is subject to the ADA, and cannot discriminate against a golfer on account of a golfer's disability. "Discrimination" under the ADA includes the failure of an owner, operator, lessee, or lessor of public accommodations "to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, [or] facilities ... to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, ... or accommodations...." 42 U.S.C. § 12182(b)(2)(A)(ii).

While the "fundamentally alter" concept originated in the Supreme Court's discussion of the reasonableness of an accommodation under the Rehabilitation Act in *Southeastern Community College v. Davis*, 442 U.S. 397, 410, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), "fundamentally alter" is now part of the statutory language of the ADA. *See* 42 U.S.C. § 12182(b)(2)(A)(ii).

Rehabilitation Act reasonable accommodations case analysis "is easily transferrable to the Title III[ADA] reasonable modifications context." *Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997). Very similar language is found in both provisions. The Rehabilitation Act defines discrimination to include "not

making reasonable accommodations ... unless [the defendant] can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A). The ADA defines discrimination to include "a failure to make reasonable modifications ... unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations...." 42 U.S.C. § 12182(b)(2)(A)(ii). The Rehabilitation Act provides an undue hardship defense; the ADA provides a fundamental alteration defense, with fundamental alteration merely a particular type of undue hardship. *See Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d at 1059; *see also* 29 C.F.R. pt. 1630, app. § 1630.2(p) (1998).

An ADA plaintiff bears the burden of proving that the requested modification is reasonable in the general sense. *See Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d at 1059; *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996); *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir.1995). The USGA does not appear to challenge the reasonableness of Mr. Olinger's requested accommodation in a general sense, and the golf cart has become so ubiquitous in the sport that any such challenge would seem doomed.

The game of golf does not forbid the use of golf carts. The Rules of Golf, prepared by the USGA, acknowledge the potential involvement of golf carts: Section 1 ("Etiquette") exhorts the golfer to observe strictly local notices regulating the movement of carts; Section II ("Definitions") defines a golf cart and everything in it as the equipment of a player involved in its movement, and Rule 19 echoes that definition. The Rules of Golf recognize that a particular event or a particular course condition may require rules in addition to the generally applicable rules, so Rule 33 empowers a committee to make

local rules, and Appendix I sets forth topics on which local rules might be advisable. One of those suggested rules relates to "Transportation," and provides, "If it is desired to require players to walk in a competition, the following condition is suggested: Players shall walk at all times during a stipulated round." The Appendix proposes a penalty of two strokes per hole, to a maximum of four strokes per round, and disqualification if the offending player does not discontinue the unauthorized form of transportation immediately. Again, however, this is not a rule of golf; it is an act within the discretion of a committee in charge of a tournament, such as the U.S. Open.

Once the ADA plaintiff establishes that the requested accommodation is reasonable in a general sense, the burden shifts to the defendant to prove that the modification would fundamentally alter the nature of the public accommodation. *See Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d at 1059. Proof must focus on the specific circumstances rather than on reasonableness in general. *See id.* at 1059-1060.

The proper inquiry, then, is not whether the requested accommodation would amount to a fundamental alteration in the game of golf (plainly, it would not), but rather whether the requested accommodation would constitute "a fundamental alteration in the nature of a program," *Southeastern Community College v. Davis*, 442 U.S. at 410, 99 S.Ct. 2361, and the "program" here at issue is the U.S. Open.

The USGA maintains that walking is required in the U.S. Open because the tournament is intended to serve as a test of stamina--of physical conditioning and ability to deal with stress--as well as a test of golf. In an odd way, this claim finds corroboration in the USGA's allowance of the use of carts in others of its tournaments. The USGA allows carts in the U.S.

Senior Men's Amateur and in the U.S. Senior Women's Amateur, both of which are conducted in the autumn for competitors at least 55 years of age. The unavailability of caddies in sufficient number provides one reason carts are allowed in those events, but the USGA also notes that those competitions are not intended to bestow an unqualified title of "national champion"--the title the USGA bestows upon the winner of the U.S. Open. The USGA does not consider the level of competition in these events to be as great as in the U.S. Open. The court sees no inconsistency in the USGA's allowing carts in some events while barring them in what they view as the national championship.

Several reasons were offered at trial for the ban on golf carts. Some would be far less persuasive standing alone. For example, Ken Venturi, who brings the expertise of a past U.S. Open champion (1964) and one who covers golf tournaments on a regular basis for CBS, testified that the use of carts could affect the tournament's outcome by affecting the lie of the ball (how the ball sits on the turf) when it comes to rest after a stroke. The player who precedes the cart might hit the ball to a given spot in the rough and have to hit from grass several inches deep; the player who follows the cart might hit to the same spot and be able to hit a ball sitting atop grass that had been flattened by a cart's tire. Conversely, the player who precedes the cart might have a good lie in the fairway, while the player behind the cart might have a poorer lie by virtue of the ball having come to rest where the much shorter fairway grass was affected by a cart tire. These are things that happen regularly during casual play, so they are part of the game of golf--but they are not part of the U.S. Open. Still, it is doubtful whether these concerns would carry the day were they all the USGA had to offer: the evidence at trial indicated that caddies are allowed to drive carts during the local qualifying at South

Bend Country Club. Perhaps the qualifying rounds differ from the championship, but the USGA won't let Mr. Olinger use a cart in the qualifying rounds.

Two points are far more persuasive to the court. First, the USGA's evidence has persuaded the court that the use of a cart can provide a golfer with a competitive advantage over a golfer who walks. Dr. James Rippe, an expert in the physiology of walking, conducted a study of extant medical literature and concluded that an average able-bodied 25-35 year-old golfer who rides a cart for an average round of golf on an average summer day (80°F, 50% relative humidity) has a significant and unfair advantage over an average able-bodied 25-35 year-old golfer who is walking. The person who walks the course under those conditions performs the same amount of physiologic work as if he had run 11-minute miles for 2.5 hours, and studies indicate that such exertion causes cognitive and psychomotor tasks to deteriorate at rates between 10 and 50 percent.

The court agrees with Mr. Olinger that a comparison between average able- bodied golfers is not the issue before the court: Mr. Olinger is not an average, able-bodied golfer. Before addressing this point of agreement, however, the court disagrees with two other points of Mr. Olinger's criticism of Dr. Rippe's study. First, working from the study's assumptions, Mr. Olinger extrapolates that Dr. Rippe's hypothetical golfer walks for an average of 1.1 minutes and stops,[5] and Mr. Olinger then

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5. Dr. Rippe assumed the round of golf takes 4 hours and 30 minutes, which, when divided between 18 holes, produces an average of 15 minutes per hole. Dr. Rippe further assumed that the walking golfer walks about 30% of the time, and so would be walking for 4.5 minutes of the 15-minute per-hole average. Assuming a scratch golfer would complete the round in 72 strokes (with the course presenting the same number of par 5 holes as

criticizes Dr. Rippe's conclusions to the extent they are based on literature that looks to fatigue from, for example, 30 continuous minutes of walking. The court agrees that a round of golf is not a continuous 4 1/2 hour walk, but Mr. Olinger's criticism assumes a walk of equal distance between shots, and golf shots vary greatly in distance, and his criticism also seems to assume rest between shots rather than engagement in the game of golf. Dr. Rippe's report of the physiologic work involved in golf comes from a study of golf, not from a study of military marksmanship.

Mr. Olinger also criticizes Dr. Rippe (and those who commissioned his study) for not engaging in what Mr. Olinger submits as an easy test of Dr. Rippe's hypothesis that fatigue affects golfing performance. Mr. Olinger suggests that the USGA could look at its own records and see if golfers' scores worsen as the tournament goes on. The court does not believe such a statistical analysis would prove (or disprove) anything. Nothing presented at this trial suggests that fatigue is the sole influence on a golfer's score. Mr. Olinger's proposed calculation would assume four days' absolute uniformity of matters such as temperature, humidity, wind, precipitation, pin placements-- all things shown by this record to affect a golfer's score.

Still, Mr. Olinger is correct that a comparison between able-bodied golfers does not resolve this case. Dr. Rippe's study reveals nothing about whether an able-bodied golfer who walks without pain would be disadvantaged in any way by a golf cart for Ford Olinger, for whom the very act of walking is fatiguing, and who, to play the sport even with the aid of a cart,

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par 3 holes) produces an average of 4 strokes per hole. Averaging the averages of 4 strokes per hole and 4.5 minutes of walking per hole produces a quotient of a little over 1.1 minute of walking per stroke.

does more walking than strictly necessary for locomotion so as better to evaluate his next shot. Dr. Rippe conceded that his report gives no such information; while he can posit the average able-bodied golfer, he does not believe he can provide a study assuming an average disabled golfer because the variety of potential disabilities (and of the individual impact of each such disability) is too great.

The court believes that Dr. Rippe's report provides a strong basis to believe that as between two roughly similar golfers, the golfer who rides is likely to have some advantage when it comes to fatigue over the golfer who walks. The extent of that advantage no doubt is variable and unmeasurable. Dr. Rippe's testimony leads the court to believe that the advantage would vary with temperature, humidity, terrain, number and types of strokes--and probably would vary with the nature and extent of the person's disabilities. The walking golfer still might choose to walk, if the golfer's abilities allowed: Mr. Olinger noted many competitive reasons a professional golfer might prefer walking to riding, and about a quarter of the participants walk in tournaments in which the USGA allows carts. Again, that choice might be influenced by things as measurable as temperature, humidity or terrain, or by things as immeasurable as how the golfer felt that day or how well he slept the night before. The court finds not that a golfer who rides invariably has a competitive advantage over a very similar golfer who walks; the court finds only that a strong possibility exists that on any particular day, such a competitive advantage might exist, and that it might be substantial.

Not much competitive advantage appears to be needed to affect the outcome of a U.S. Open. Slightly over 100 U.S. Opens have been played, and on 30 occasions, a playoff was needed to

decide the winner, so a single stroke can be determinative.[6] The record does not tell us the average winning score of a U.S. Open, but Mr. Venturi testified to rounds totaling 278 in 1964; the difference between that score and 279 is a little over a third of a percent.[7]

Mr. Olinger notes that in the last 13 years, only 11 golfers have asked permission to ride in the U.S. Open. From that statistic, it might be inferred that comparable golfer--the golfer as to whom Mr. Olinger would have a competitive advantage were he allowed to ride--either does not exist, or has not sought permission to use a cart in the U.S. Open. This brings the analysis to the second of the USGA's persuasive points: who would make such a determination? This court has been able to decide Mr. Olinger's need to ride a cart with the assistance of excellent attorneys who have had access to far more information than the court ultimately needed. The USGA's application form does not demand that sort of information from applicants. Perhaps the USGA could demand such information, but the USGA then also would need to develop a system and a fund of expertise to determine whether a given applicant truly needs, or merely wants, or could use but does not need, to ride a cart to compete.

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6. One would think that a single stroke would have an impact on money won or lost below the levels of a first and second places, but the trial record offers no information on that suspicion.

7. Defendant's Exhibit D, the USGA publicity videotape of Mr. Venturi's triumphant Open, reveals that Mr. Venturi actually won the tournament by 4 strokes, and that Mr. Venturi's score of 278 was not a representative winning score (only one other winning score was below 280 by that time). But Mr. Venturi's is the only winning score identified in the trial record, and percentage would be even lower were a more common winning score used.

Once the inquiry moves beyond Mr. Olinger, the issue broadens and becomes far more difficult. Ford Olinger must ride a golf cart to play, and even with a cart he is likely to be more fatigued at the day's end than a healthy Tiger Woods or a healthy David Duvall. Perhaps it will be easy to say the same thing about next year's applicant for cart use--but how will that applicant be compared to Ford Olinger? Will next year's applicant for permission to ride have a competitive advantage over Mr. Olinger if allowed to ride? Will Mr. Olinger have a competitive advantage over next year's applicant if both are allowed to ride? If either would have an advantage over the other, would one be allowed to ride? or both? or neither?

A court deciding a case under the ADA must make an individualized decision concerning the plaintiff, but a court evaluating a requested accommodation's impact on the nature of an activity or program also must give full consideration to that impact. The U.S. Open never has used rules or discretionary decisions for the purposes of giving one competitor a systemic advantage over another. All competitors play by the same rules: they hit from the same tees; they are bound by the same limits concerning the number of clubs they may carry; none may switch to a different type of ball during a round. To require that someone be given the discretion to allow one competitor a potential advantage denied to others would fundamentally alter the nature of the competition.

The only alternative would be to take the discretion out of the accommodation, and allow all U.S. Open competitors to ride golf carts if they so choose. To do so, however, would be to remove stamina (at least, a particular type of stamina) from the set of qualities designed to be tested in this competition. Conditions that now affect a golfer's performance, but which lie beyond the golfer's ability to control--the fatigue born of hills, of heat, of humidity-- would lessen in importance to the

competition. Again, the nature of the competition would be fundamentally altered.

It is important, especially when a court deals with athletic competition, not to allow "stamina" or "nature of the program" to become a proxy for discrimination against persons protected by the ADA. That vigilance is no less important when the requested accommodation is one afforded to thousands of weekend (and weekday) golfers and even to golfers in other professional events, including events conducted by the USGA. As noted before, though, it is also important to remain focused on the nature of the "program" to which Mr. Olinger seeks access: the U.S. Open. Based on this record, the court is convinced both that the requested accommodation would fundamentally alter the nature of the U.S. Open, and that the "nature" of the program is not a proxy for discrimination against persons who, like Mr. Olinger, cannot walk a golf course.

Athletic competition presents ADA concerns different from those presented by the workplace. In the workplace, the pertinent inquiry is whether a particular otherwise qualified individual can perform the job if a reasonable accommodation is made to allow for the person's disability. The point of an athletic competition, in contrast, is to decide who, under conditions that are about the same for everyone, can perform an assigned set of tasks better than (not as well as) any other competitor. The set of tasks assigned to the competitor in the U.S. Open includes not merely striking a golf ball with precision, but doing so under greater than usual mental and physical stress. The accommodation Mr. Olinger seeks, while reasonable in a general sense, would alter the fundamental nature of that competition.

IV

For these reasons, the court finds for the defendant and against the plaintiff on the plaintiff's complaint. The clerk shall enter judgment for the defendant.

STATUTORY APPENDIX

AMERICANS WITH DISABILITIES ACT

42 U.S.C. chapter 126

(Relevant portions)

§ 12101. Findings and purpose

(a) Findings

The Congress find that -

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional

exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter -

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

. . . .

§12102. Definitions

As used in this chapter:

. . . .

(2) Disability

The term "disability" means, with respect to an individual -

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

. . . .

§12182. Prohibition of discrimination by public accommodations

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction

(1) General prohibition

(A) Activities

(i) Denial of participation

It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit

It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit

It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege,

advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals

For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings

Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate

Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) Administrative methods

An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration -

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are

subject to common administrative control.

(E) Association

It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) Specific prohibitions

(A) Discrimination

For purposes of subsection (a) of this section, discrimination includes -

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other indivi-

duals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

. . . .

§12188. Enforcement

(a) In general

(1) Availability of remedies and procedures

The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title. Nothing in this section shall require a person with a disability to engage in a futile

gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.

(2) Injunctive relief

In the case of violations of sections 12182(b)(2)(A)(iv) and section 12183(a) of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this subchapter.

(b) Enforcement by Attorney General

(1) Denial of rights

(A) Duty to investigate

(i) In general

The Attorney General shall investigate alleged violations of this subchapter, and shall undertake periodic reviews of compliance of covered entities under this subchapter.

(ii) Attorney General certification

On the application of a State or local government, the Attorney General may, in consultation with the Architectural and Transportation Barriers Compliance Board, and after prior notice and a public hearing at which persons, including individuals with disabilities, are provided an opportunity to testify against such certification, certify that a State law or local building code or similar ordinance that establishes accessibility requirements meets or exceeds the minimum requirements of this chapter for the accessibility and usability of covered

facilities under this subchapter. At any enforcement proceeding under this section, such certification by the Attorney General shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of this chapter.

(B) Potential violation

If the Attorney General has reasonable cause to believe that -

(i) any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter; or

(ii) any person or group of persons has been discriminated against under this subchapter and such discrimination raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

(2) Authority of court

In a civil action under paragraph (1)(B), the court -

(A) may grant any equitable relief that such court considers to be appropriate, including, to the extent required by this subchapter -

(i) granting temporary, preliminary, or permanent relief;

(ii) providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and

(iii) making facilities readily accessible to and usable by individuals with disabilities;

(B) may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(C) may, to vindicate the public interest, assess a civil penalty against the entity in an amount -

(i) not exceeding $50,000 for a first violation; and

(ii) not exceeding $100,000 for any subsequent violation.

(3) Single violation

For purposes of paragraph (2)(C), in determining whether a first or subsequent violation has occurred, a determination in a single action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation.

(4) Punitive damages

For purposes of subsection (b)(2)(B) of this section, the term "monetary damages" and "such other relief" does not include punitive damages.

(5) Judicial consideration

In a civil action under paragraph (1)(B), the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this chapter by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.